

No. 15404.

IN THE

United States Court of Appeals
FOR THE NINTH CIRCUIT

A. J. KAHN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

LAUGHLIN E. WATERS,
United States Attorney,

LOUIS LEE ABBOTT,
Assistant U. S. Attorney,
Chief, Criminal Division,

LLOYD F. DUNN,
Assistant U. S. Attorney,
Assistant Chief, Criminal Division,
600 Federal Building,
Los Angeles 12, California,
Attorneys for Appellee.

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APPELLEE'S BRIEF.

Jurisdictional Statement.

The appellee concurs in the jurisdictional statement made by the appellant.

Statement of the Case.

The appellee concurs in the statement of the case made by the appellant.

Statements of Facts.

The appellee concurs in the factual statement made by appellant except that certain facts, set out *infra*, were omitted in that statement. The additional evidence should be considered in the determination of this appeal. As appellant concedes (Appellant's Br. p. 6) upon this review the Government is entitled to have this Court view the evidence in the light most favorable to it.

Appellant correctly states that there was specific evidence of wagering transactions with him totaling \$1,970.00 in September 1953 (Appellant's Br. p. 10). This included "the Qualin bets" (Appellant's Br. p. 25)

of \$900.00 which were placed with appellant at the Del Mar race track. [Tr. pp. 140-142.] The evidence showed additional betting activity in November 1953, which related to the question of whether appellant was "engaged in the business of accepting wagers". This was comprised of Exhibit 8 [Tr. pp. 51, 134] for \$620.00 and Exhibit 9 [Tr. pp. 52, 134] for \$200.00, admitted on the testimony of the witness Ursich.

In December, 1953 appellant concedes the evidence shows \$1,350.00 in wagers, and \$3,610.00 in March, 1954. These admissions were based on Exhibits in evidence. However appellant overlooked the testimony of betting activity on March 24 and 25, 1954, which did not have related documentary proof.

Ursich testified he lost \$2,300.00 to Kahn on March 24 [Tr. p. 68]. This was corroborated by the witness Zimmerman [Tr. pp. 174, 175, 185]. Ursich testified that he bet \$500.00 with Kahn on March 25 [Tr. p. 72] as well as an unspecified amount of additional bets [Tr. p. 71]. This testimony was likewise corroborated by Zimmerman [Tr. pp. 175, 176, 184]. The specific amounts for March 1954 therefore total \$6,410.00. This "action" was so important to appellant that he appointed a "professional gambler" [Tr. pp. 69, 179, 200] to handle it for him while he was enjoying a holiday at Las Vegas [Tr. p. 174]. In that connection Zimmerman testified as follows:

"A. Well, he mentioned that he was going to Vegas for a couple of days.

Q. Now, you are referring to Mr. Kahn?

A. Mr. Kahn, and would I do him a favor and take care of Mr. Ursich, in other words, take Mr. Ursich's bets while he was away.

Q. And what did you say in reply to that?

A. I agreed to it." [Tr. pp. 172-173.]

Zimmerman and appellant had a long-distance telephone conversation, Los Angeles to Las Vegas, the morning of March 25th about Ursich's losses of the 24th [Tr. pp. 174-175]. On the afternoon of the 25th Ursich's betting activities occasioned an attempted Los Angeles to Las Vegas call from appellant's son, Yale Kahn, to appellant [Tr. p. 176], and a successful telephone call from Zimmerman to appellant from Los Angeles to Las Vegas [Tr. p. 176].

Appellant had solicited Ursich's betting activity as far back as 1949 or 1950 [Tr. p. 74]. The witness Qualin testified:

"A. Yes. I made a lot of bets with Mr. Kahn.

Q. (By Mr. Dunn): When was the first time that you placed a bet with Mr. Kahn? A. I bet with Mr. Kahn in 1948, baseball." [Tr. p. 140.]

* * * * *

"Q. Had you previously in the period, then, from July 1, 1953 until this day before Labor Day placed bets with Mr. Kahn? A. From '53 on, I mean that is the last bets I made. I mean I was through.

Q. And did you place the bets the Saturday before Labor Day? A. Yes sir.

Q. And you, from July 1, 1953, up until the two days before Labor Day, placed other bets with him?

A. I might have, small bets." [Tr. p. 142.]

Ursich had placed bets "once or twice" for John Martinolich in 1953 or 1954 [Tr. pp. 74-75].

At the time the foregoing betting activity was taking place (totaling \$10,550.00 in seven months) appellant was earning a salary of \$500.00 a month [Tr. pp. 235-236].

ARGUMENT.

A.

The Meaning of “Engaged in the Business of Accepting Wagers.”

The appellant's principal, if not only, point on appeal is that he was not shown to be “engaged in the business of accepting wagers”. Appellant concedes that the evidence was clearly of wagers between appellant and the witnesses (Appellant's Br. pp. 14-15), not on behalf of any other person, and it follows that appellant was acting as the principal.

Appellant has briefed and presented to the Court the leading authorities as to what constitutes “engaging in business” under other statutes. We are here dealing with a new law, concerning which there are at this time few decided cases to help us. We think it is clear that there is sufficient evidence to sustain the conviction accepting the definition contended for by appellant, *i.e.*, commercialized gambling. We disagree, however, as did the trial Court, with his, conclusion that the wagers were of the friendly or sociable type.

Appellant in his brief has quoted the 1951 United States Code Congressional Service. We would like to continue with that quotation, since he has omitted some significant and helpful language therefrom:

“Wagers on sports events or contests, to be taxable, must be placed with a person engaged in the business of accepting such wagers. The purpose of this requirement is to exclude from the tax the purely ‘social’ or ‘friendly’ type of bet. *A person is considered to be in the business of accepting wagers if he is engaged as a principal who, in accepting wagers, does so on his own account.* The

principals in such transactions are commonly referred to as 'bookmakers', although it is not intended that any technical definition of 'bookmaker', such as the maintenance of a handbook or other device for the recording of wagers, be required. It is intended that a wager be considered as 'placed' with a principal when it has been placed with another person acting for him. Persons who receive bets for principals are sometimes known as 'bookmakers' agents' or as 'runners'. *It is not intended that to be 'engaged in the business of accepting such wagers' a person must be either so engaged to the exclusion of all other activities or even primarily so engaged.* Thus, for example, an individual may be primarily engaged as a salesman, and also, for the purposes of this tax, be engaged in the business of accepting wagers." (Emphasis supplied.)

U. S. Code Cong. Service, 1st Sess., 82nd Cong., 1951, House Report, pp. 1838-1839.

Particular attention is called to the emphasized portions of the foregoing Report. Here appellant did engage in accepting wagers as a principal of his own account. Although he may have been primarily engaged in the operation of the family chain of bars, it is submitted that he was also engaged in the business of accepting wagers.

In *Karnuth v. United States*, 279 U. S. 231, 243, 49 S. Ct. 274, 278, 73 L. Ed. 677, it was said:

"* * * the case is therefore narrowed to the simple inquiry whether the word 'business', as used in the statute, includes ordinary work for hire. The word is one of flexibility; and, when used in a statute, its meaning depends upon the context or upon the purposes of the legislation. * * *" (Emphasis supplied.)

The Treasury Department has issued regulations in connection with the wagering tax to explain the meaning. (See Regs. 132, 16 Fed. Reg. 11211, November 3, 1951, as reported in 26 C. F. R. (1940 ed., Cumulative Pocket Supplement for 1954) Sec. 325.21), which regulations read in part:

“(B) A person is engaged in the business of accepting wagers if he makes it a practice to accept wagers with respect to which he assumes the risk of profit or loss depending upon the outcome of the event or the contest with respect to which the wager is accepted. It is not intended that to be engaged in the business of accepting wagers a person must be either so engaged to the exclusion of all other activities or even primarily so engaged. Thus, for example, an individual may be primarily engaged in business as a salesman, and also for the purpose of the tax be engaged in the business of accepting wagers.”

We submit that it is not necessary that to be liable under the statutes here involved a person be engaged in the business of accepting wagers to the exclusion of all other activities, or that it be his primary business, but that it is sufficient to prove that he is engaged in such activity as a principal, and is not merely making an occasional friendly or social wager. The House Report referred to *supra* so indicates, and the Treasury Department has given effect to this Report by virtue of the foregoing Regulation. It is further submitted that proof on the point that appellant was engaged in the business of accepting wagers is more than adequate.

B.

The Evidence Was Sufficient to Sustain the Factual Determination That the Appellant Was "Engaged in the Business of Accepting Wagers."

The question as to whether appellant was "engaged in the business of accepting wagers" is a question of fact (*Cf. Ramsey v. United States* (9th Cir.), Mar. 27, 1957, #15,094, at page 3, slip sheet opinion) to be determined by the trier of fact, here the District Court, a jury having been waived [Tr. p. 15]. A specific finding of fact that appellant was so engaged during the times in question was made by the Court [Tr. p. 22]. The appellant now has the burden of showing that there was no substantial evidence to support the finding if he is to prevail on appeal.

It is well settled that the appellate court will not review questions of fact or weigh evidence, where there is any substantial and competent evidence to support a finding of guilt, that the court will take a view of the evidence most favorable to the government and will give the government the benefit of all inferences which reasonably may be drawn from the evidence.

Woodward Laboratories, Inc., et al. v. United States, 198 F. 2d 995, 998 (9th Cir. 1952);

Pasadena Research Laboratories v. United States, 169 F. 2d 375, 380 (9th Cir. 1948), Cert. den. 335 U. S. 853.

The foregoing rules apply to Court trials also:

C-O-Two Fire Equipment Co. v. United States, 197 F. 2d 489, 491 (9th Cir. 1952), Cert. den. 344 U. S. 892;

United States v. Empire Packing Co., 174 F. 2d 16 (7th Cir. 1949), Cert. den. 337 U. S. 959.

The facts, more fully set forth in the Statement of Facts, *supra*, are that from 1948 appellant was known to be a person who would book wagers. During the seven month period covered by the specifications of the Bill of Particulars, appellant booked at least \$10,550.00 in bets, an average of over \$1,500.00 per month. This was not a bad supplemental income for a man on a \$500.00 monthly salary. The business was so important to appellant that he employed Zimmerman, a professional gambler, to take the "action" while appellant was away. In carrying out the business while absent, appellant engaged in a couple of long-distance telephone calls about it. Appellant would now have us believe that this was just social betting. That fact issue was before the Court and was found contrary to appellant's position. Can it now be said that there was such a paucity of evidence on the point that this honorable Court should overturn the decision of the trial Court? We think not.

C.

Qualin Bets Not Excluded.

The argument that the "Qualin bets" should be excluded is specious and hardly warrants mention. Appellant quotes the "Exclusions from the Tax" and the quotation clearly applies only to bets placed in the parimutuel pool whereas the plain meaning of the testimony was that appellant booked Qualin's bets because Qualin did not have the cash to bet through the parimutuel windows [Tr. pp. 140-141, 144].

Conclusion.

There being substantial evidence on which the trial Court could find that appellant was engaged in the business of accepting wagers, it is respectfully requested that this honorable Court affirm appellant's conviction.

Respectfully submitted,

LAUGHLIN E. WATERS,

United States Attorney,

LOUIS LEE ABBOTT,

Assist. U. S. Attorney,

Chief, Criminal Division,

LLOYD F. DUNN,

Assist. U. S. Attorney,

Assist. Chief, Criminal Division.

Attorneys for Appellee.

